IN THE

Supreme Court of the United States

No. 174

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, *Petitioner*

v.

EMBASSY RESTAURANT, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE WELFARE FUNDS—RESPONDENTS

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QUESTION PRESENTED

Whether payments made by an employer to a union welfare fund at the request of his employees pursuant to a collective bargaining agreement, under which the employees gave up their paid sick leave benefits in return for payments to the welfare fund which provided life insurance, hospitalization and accident benefits to them, are "wages . . . due to workmen, servants, clerks" and thus entitled to priority within the meaning of Section 64(a)(2) of the Bankruptcy Act.

SUMMARY OF ARGUMENT

This case involves the question of whether the expression "wages due to workmen" in Section 64(a) (2) of the Bankruptcy Act is to be given the strict and limited construction sought by the Government or whether it is to be interpreted in accordance with the realities of our economic life in the manner of the court below. The exact issue is whether employer contributions to a welfare fund established by collective bargaining agreement are entitled to preference under Section 64(a) (2) of the Bankruptcy Act as "wages . . . due to workmen . . ."

We believe that it would be of some benefit to the Court to consider briefly the place of welfare funds in our industrial economy. The protection of the employee and his family against the ravages of illness, hospitalization, unemployment and death is now generally recognized as a necessary benefit deriving from the employment relationship. One of the recent aims of organized labor has been to provide its members with coverage and protection against these adversities.

Welfare plans were created to serve this purpose. They grew particularly in recent years when direct wage increases were regulated and controlled, and fringe benefits were treated more favorably by governmental authorities.[1]

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[1] The Final Report of the Senate Committee on Labor and Public Welfare, 84th Congress, 2d Session, Senate Report No. 1734, ascribed the growth of welfare and pension plans to a natural human desire for security against illness, unemployment, old age and death, and sets forth four other factors contributing to this growth. They are:

1. High corporation taxes since World War II with tax deductions permitted for these contributions;

2. Wage stabilization programs which have frozen wage rates, but permitted "fringe" benefits of this sort;

3. Court decisions that welfare and pension matters were bargainable issues;

4. The attempt of labor unions to obtain and expand coverage for their members under these programs.

Such welfare programs provide employees, their families and dependents with medical or hospital care, sickness and accident insurance, life insurance coverage and other forms of benefits. Under collective bargaining agreements at the end of 1954 approximately twenty-nine million individuals received hospitalization coverage and over eleven million were provided with life insurance or death benefits.[2]

In early 1954, at least 11,290,000 workers (excluding government and railroad employees) were benefited by welfare plans under collective bargaining contracts. *Health, Insurance and Pension Plans in Union Contracts.* Bureau of Labor Statistics Bulletin 1137 (1955). At that time approximately 70 percent of all workers under collective bargaining agreements were provided with at least one type of health, insurance or pension benefits. Of the workers covered by insurance plans 62.1 percent of the plans were supported entirely by employer contributions. In the pension field 84.7 percent of all employees were covered by plans providing only for employer contributions. In both instances the bulk of the remaining workers were covered

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[2] The Senate Labor Committee Report, Welfare and Pension Plans Investigation, 84th Congress, 2d Session, Senate Report No. 1734, contains in Appendix I, page 82, a statistical table which is reproduced here in part:

Estimated number of employees and their dependents covered under private employee welfare and pension plans, end of 1954 (In thousands)

(Under collective bargaining)

	Employees	*Dependents*	*Total*
Life insurance & death benefits	11,000	300	11,300
Accidental death & dismemberment	6,000		6,000
Temporary disability benefits and sick leave	10,000		10,000
Hospitalization	12,000	17,000	29,000
Surgical	11,000	15,000	26,000
Medical	6,500	8,300	14,800
Major medical	not available		
Pension Plans	7,200		7,200

by plans calling for contributions by both employers and employees. Only in a few instances did the plans call only for employee contributions. *Rowe, Health, Insurance and Pension Plans in Union Contracts*, Vol. 78, Monthly Labor Review, pp. 993-1000.

Thus, welfare plans have come into wide prominence since World War II and exist today in almost all of the nation's major industries. It is clear that welfare and pension benefits occupy a firm and expanding position in our industrial economy. It is recognized that the protection of the employee and his family against adversity resulting from illness or death is as important as his protection through workmen's compensation laws against injury incurred while on the job. These benefits are part of an employee's wage picture and part of an employer's cost. Because of the added cost to employers in agreeing to such plans, benefits under welfare plans have become a major issue in collective bargaining. See *Final Report, Senate Committee on Labor and Public Welfare, Welfare and Pension Plans Investigation*, supra. They are part and parcel of the employment relationship and constitute an important facet of our industrial society.

The welfare fund contributions in the instant case were established by collective bargaining agreement, along with other fringe benefits, such as vacation pay, severance pay, holiday pay, etc. In fact, the contributions here are a direct substitute for sick leave pay for which the contract formerly provided. This fringe benefit is no different from those which the courts have consistently held are entitled to priority as "wages . . . due to workmen."

The view of the court below is perfectly consistent with the ever expanding definition of the term "wages." Congress has impliedly approved this expansion in numerous other enactments and by reason of its failure to place any limitation upon the liberal interpretation which courts have given to this word in the Bankruptcy Act. Indeed, the interpretation we support here is in accord with the Con-

gressional purpose of protecting the wage earner against adversity at the time of loss of employment.

Welfare fund contributions are an integral part of an employee's wage picture. The employer's obligation to pay them does not arise from a debtor-creditor relationship, but from the collectively bargained wage structure. These amounts are as much "due to" employees as the wages paid to them in cash. *United States v. Carter*, 353 U. S. 210 (1957).

The courts which have been faced with the problem presented in the instant case have divided almost equally in their answer to the question posed. In *In re Otto*, 146 F. Supp. 786 (S. D. Cal. 1956), *In re Schmidt*, 33 Labor Relations Reference Manual 2283 (S. D. Cal. 1953), and *In re Embassy Restaurant, Inc.*, 154 F. Supp. 141 (E. D. Pa. 1957) *aff'd* 254 F. 2d 475 (3rd Cir. 1958), the courts have held that welfare fund contributions owed by an employer are part of the compensation due employees and entitled to preference under Section 64 (a) (2) of the Bankruptcy Act as "wages . . . due to workmen." In *In re Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S. D. N. Y. 1956), *aff'd sub nom. Local 140 Security Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957), *cert. den.* 355 U. S. 833, *In re Brassel*, 135 F. Supp. 827 (N. D. N. Y. 1955) and *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J. 1957) (now pending on appeal to the Third Circuit), the courts have held that welfare fund contributions were not "wages" within the meaning of the priority section of the Bankruptcy Act.

The approach which courts should take to problems involving welfare funds was well stated by Judge Goodrich, in *Local 333 v. Essex Transportation Co.*, 216 F. 2d 410, 411 (3rd Cir. 1954): "We approach the question with the thought in mind that these welfare funds represent a social device to be encouraged." Further, as Judge Goodrich observed at page 413, welfare funds have "met with legislative sanction, judicial approval and represent a growing trend in employer-employee relations."

That Judge Goodrich accurately read the temper of present day attitudes is evidenced by the most recent Congressional finding on this subject. Section 2(a) of the Welfare and Pension Plans Disclosure Act, Public Law 85-836, 72 Stat. 997 (approved Aug. 28, 1958) provides in part as follows:

> "Sec. 2(a)—The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations. . . ."

Accordingly, where a construction of law favoring welfare funds is permissible under the language being interpreted, it should be adopted. Here the word "wages" certainly may be interpreted to include payments for welfare fund benefits. This construction should be adopted because it is the policy of the law to encourage this form of protection accorded employees and their families.

ARGUMENT

I. Welfare Fund Contributions Are "Wages" Within the Meaning of Section 64(a)(2) of the Bankruptcy Act.

It is interesting to note at first the advancement in the status of wage claims in the successive Bankruptcy Acts. Wage claims under the Chandler Act, Act of June 22, 1938, 52 Stat. 840, 11 U. S. C. 104(a), have been advanced to the highest priority they have ever held.

In the original Act of August 19, 1841, 5 Stat. 440, three classes of priority were established, the third of which was wages. Wage claims were granted fourth standing out of five priority groups in the Act of March 2, 1867, 14 Stat. 517. Section 64 of the Bankruptcy Act, Act of July 1, 1898, 30 Stat. 544, established two classes of priorities, the first being taxes and the second being all others including wages. Section 64(a) of the Chandler Act, the present Bankruptcy Act, improved the status of the wage priority by granting it second standing ahead of a fourth priority for federal and local taxes.

This legislative intent expressed in the present Section 64(a)(2), to favor the wage earner in obtaining his just due from the bankrupt's estate by elevating the wage earner's claim over all priority claims except the actual costs of preserving the bankrupt's estate, has been recognized by this Court. This Court has displayed its awareness of the Congressional purpose of advancing the wage priority even at the expense of the governmental tax claims. In *Guarantee Title and Trust Co. v. Title Guaranty and Surety Co.*, 224 U. S. 152 (1912), this Court said:

> "The policy which dictated it (Bankruptcy Act) was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor" 224 U. S. at page 160.

The legislative elevation of the wage priority has been consistent with the expanding judicial definition and use of the term "wages" in the Bankruptcy Act and the parallel expansion and development of our industrial society. Congress has never changed, amended or in any way limited the use of the word.

The term "wages" in the successive bankruptcy statutes has never been expressly defined by Congress. The courts have concluded that no technical definition of the word has been included in the Act because it is a plain, simple word meaning "the agreed compensation for services rendered." *In re Gurewitz*, 121 Fed. 982, 983 (2d Cir. 1903). The term has generally been construed "in its broader and more general sense" to attain this meaning. *In re Dexter*, 158 Fed. 788 (1st Cir. 1907); *In re Otto*, 146 F. Supp. 786 (S. D. Cal. 1956).

The term "wages" has been generally defined as "the compensation paid by an employer for services rendered to him by others." *Glandzis et al. v. Callinicos*, 140 F. 2d 111 (2d Cir. 1944). It arises directly from the employer-employee relationship. But, as we shall point out, "wages" has always been construed to mean more than just the hourly, daily or weekly rate of pay for labor performed. It has been expanded to cover all types of compensation received for services rendered.[3]

This broad approach to the term "wages" has been in accordance with the liberal interpretation which courts have customarily given the term:

> "It is well-settled that provisions of the Bankruptcy Act giving priority to claims for wages due employees are to be liberally construed." *Manly v. Hood*, 37 F. 2d 212, 214 (4th Cir. 1930).[4]

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[3] See Note, 19 Georgia Bar Journal 107 (1956).

[4] The Government's argument that priorities in bankruptcy should be strictly construed has never been applied to the definition of the term "wages". Although courts have sometimes strictly construed the definition of "workmen, servants, (and) clerks", these

The wage priority is generally understood to be remedial in nature and courts have not looked kindly upon any limitation of its scope. *In re Caldwell*, 164 F. 515 (E. D. Ark. 1908); *In re Roebuck Weather Strip and Wire Screen Co.*, 180 F. 497, 498 ((S. D. N. Y. 1910); *In re Rodgers and Garrett Timber Co.*, 22 F. 2d 571 (D. Md. 1927). The complete absence of any restrictive interpretations of the term "wages" in the century since the priority was first granted is indeed noteworthy.[5]

The meaning of the term "wages" in Section 64(a)(2) has steadily expanded as new methods of computing "compensation for services rendered" have come into use in commerce and industry. *In re Otto*, supra. Today, "wages" are held to include vacation pay: *In re Public Ledger, Inc.*, 161 F. 2d 762, 767 (3d Cir. 1947), *Division of Enforcement v. Sampsell*, 172 F. 2d 400 (9th Cir. 1949), *In re Willow Cafeterias, Inc.*, 111 F. 2d 429 (2d Cir. 1940), *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Cal. 1948); severance pay: *McCloskey v. Division of Enforcement*, 200 F. 2d 402 (9th Cir. 1952); disability insurance premiums deducted by an employer and paid to an insurance company: *In re Ross*, 117 F. Supp. 346 (N. D. Cal. 1953); back pay: *National Labor Relations Board v. Killoren*, 122 F. 2d 609 (8th Cir. 1941), *cert. den.* 314 U. S. 696.

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decisions may be attributed to judicial unwillingness to expand the class of employees entitled to priority lest the more needy wage earner's recovery be diluted. See *In re Paradise Catering Corp.*, 36 F. Supp. 974 (S.D.N.Y. 1941); *In re Estey*, 6 F. Supp. 570 (S.D.N.Y. 1934), both of which were relied upon by the court *In the Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S.D.N.Y. 1956) aff'd sub nom. *Local 140 Securtiy Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957), cert. den. 355 U.S. 833.

[5] Only in answering the issue presented here have some courts attempted to retrench from the steadily expanding definition of the term "wages". *In re Brassel*, 135 F. Supp. 827 (N.D.N.Y. 1955); *In the Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S.D.N.Y. 1956) *aff'd sub nom; Local 140 Securtiy Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957) *cert. den.*, 355 U.S. 833; *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D.N.J. 1957).

Thus, in *Otto, supra*, the court concluded that "an employer's contributions to a welfare fund for the benefit of employees and others, payable in performance of an obligation of the employer under a collective bargaining agreement, and measured on the basis of a certain amount per hour worked by employees, is but another method of computing and paying compensation for services rendered, and accordingly should be held to be 'wages' within the meaning of Section 64 (a) (2) of the Bankruptcy Act." Cf. *McKee v. Paradise*, 299 U. S. 119 (1936).

The restrictive and technical view urged by the Government in this case disregards the steady expansion of the term "wages." Certainly when Congress originally used the term in the Bankruptcy Act of 1841, it did not have within its contemplation items such as vacation pay, severance pay, welfare fund contributions, or the many other fringe benefits which today constitute compensation for services rendered. The Government's argument that Congress never intended to include welfare fund contributions within the priority applies equally to vacation pay, severance pay and other fringe benefits which are accepted today without question as falling within the wage priority. To limit the definition of wages to its nineteenth century content would be to neglect totally a century of liberal intrepretation of the term and the continuing judicial expansion of its definition to meet modern economic conditions.

An examination of other contexts in which Congress has used the word "wages" may be helpful. The Government points out that welfare fund contributions are not treated as wages under the Revenue Act of 1954, 26 U. S. C. 106; the Federal Insurance Contributions Act, 26 U. S. C. 3121 (a) (2); the Federal Unemployment Tax Act, 26 U. S. C. 3306 (b) (2); and the Social Security Act, 42 U. S. C. 409 (b). What the Government neglects to point out is that in each case the exclusion is by virtue of a specific legislative exception.

To use the words of Chief Justice Marshall it is a well-established

> "... rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made." *Brown v. Maryland*, 25 U. S. (12 Wheaton) 419, 438 (1827).

It was necessary specifically to except these contributions from the definition of "wages" in these statutes, because they would have been within the general definition had the exception not been made. *In re Otto*, supra.[6] And in the absence of specific exceptions, welfare fund contributions have been held to constitute wages within the meaning of the Social Security Act, *MacPherson v. Ewing*, 107 F. Supp. 666 (N. D. Cal. 1952) and the Federal Employment Tax Act, *The City of Avalon*, 156 F. 2d 500 (9th Cir. 1946).[7]

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[6] In a Note in 66 Yale Law Journal, 449, 459, the author prefers the view that it is doubtful if Congress has a single notion of "wages" applicable to each statute in which the term appears. He suggests that the use of other statutes in interpreting the term is of doubtful value if the policy considerations are not the same. We shall point out hereinafter that under a statute with a purpose similar to the Bankruptcy Act, this Court has adopted an interpretation similar to that of court below. *U. S. v. Carter*, 353 U. S. 21 (1957).

[7] The government's citation of the English statute is of no aid here because the statute relied upon is not a bankruptcy statute, but concerns insurance and medical care under a totally different social system. The amendment to Section 22 of the New York Debtor and Creditor Law, McKinney's Consolidated Laws c. 12, relied upon by the government, may have had as its purpose only the effectuation of the original legislative intent. In the absence of legislative history, we do not know whether the New York legislature may have amended its law only to reverse judicial misunderstanding of its original purpose.

The same may also be said as to H.R. 8805, 85th Congress, 1st Session, relied upon by the Government. Congress did not consider the bill, and we do not know whether the sponsor may only have been concerned with reversing the decisional trend of the New York cases, such as *Brassel* and *Hack*. In any case, the statement in the Government's brief that the bill would not cover the welfare fund

Moreover, the exception of welfare fund contributions from the definition of "wages" in the cited statutes only serves to emphasize the favor with which Congress regards such contributions. The Revenue Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Social Security Act are all taxing statutes and, in the absence of the exception, welfare fund contributions would be regarded as taxable to the employee and used in computing the applicable deductions under those statutes. Congress obviously intended to confer upon these contributions a tax benefit rather than to have the amount of the contribution paid to the employee, taxed to him, and then assigned to the welfare fund or the insurance company.

The National Labor Relations Board, admittedly an expert body in the field of industrial relations, has interpreted the word "wages" in Section 9 of the National Labor Relations Act, 29 U.S.C.A. 159, as including welfare fund contributions. In *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 251 (7th Cir. 1948), *cert. den.* 336 U.S. 960, the court said:

> "We are convinced and find that the term 'wages' . . . must be construed to include emoluments of value, like pension and insurance benefits, which accrue to employees out of their employment relationship. Realistically viewed, this type of wage enhancement or increase no less than others, becomes an integral part of the entire wage structure and the character of the employee representatives' interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is affected . . .
>
> "It surely cannot be seriously disputed that such a pledge on the part of the Company forms a part of the

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contributions involved here fails to consider that the contributions here are made per month for each employee member of the Union in the employ of the particular employer (R. 29, 30). The contributions are thus based upon employment status which encompasses "hours worked or wages paid."

consideration for work performed . . . In this view, a pension thus promised would appear to be as much a part of 'wages' as the money paid him at the time of the rendition of his services . . . Such obligation (payments not made as a result of a promise contained in a plan or program) would represent a part of the consideration for services performed and payments made in discharge of such obligation would in our view be 'wages'."

See also *National Labor Relations Board v. Black-Clawson Co.*, 210 F. 2d 523 (6th Cir. 1954); *W. W. Cross & Co. v. National Labor Relations Board*, 174 F. 2d 875 (1st Cir. 1949).

These cases merely provide judicial recognition of the fact that in present day industrial relations fringe benefits in the form of medical services, hospital services, pension plans and the like are as much desired by employees as direct wage increases. In fact, in speaking of all the benefits conferred by a collective bargaining agreement, both management and labor speak of the "package" which contains both direct wages payments and indirect wage payments in the form of fringe benefits. And employees think of the employer's total contribution as the equivalent of wages paid in ready cash. They have merely assigned a portion of their total wage payments to buy these additional benefits not received immediately in cash. Whether or not the employees have formally assigned this portion of their total wage to the welfare fund in strict compliance with the vagaries of local law may create a technical legal problem, but it is one which is of no significance in the administration of the Bankruptcy Act. *Cf. Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186 (1907).

Perhaps an example may serve to illustrate this point. Suppose an employer and a union negotiate a five cents per hour increase across the board in rates of employees' pay. Clearly this additional nickel would be "wages" en-

titled to priority under Section 64(a)(2) of the Bankruptcy Act. Now, suppose the employees instead instruct their union to negotiate an increase in benefits provided under their welfare plan which would cost their employer an additional five cents per hour. The wage cost to the employer is the same in each case. And certainly it makes no difference to the employer whether this nickel an hour increase is paid directly to the employees or to the welfare fund. In either case, it represents an additional wage cost of five cents. But the Government would want this same nickel to be treated differently in the latter case by being denied the priority granted in the former.

We submit that this different legal treatment of the same five cents an hour cannot be justified in fact or in theory. Whatever its ultimate destination, this nickel is a part of the total wage picture and is being paid by the employer to his employees as part of their compensation for services rendered. In either case, it is accordingly "wages" within the meaning of the Bankruptcy Act.

The Court below thoroughly understood this principle and the realities of our modern day industrial society. The court very clearly stated:

> "Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L.J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages." (R. 45).

The reasoning is strengthened by further analogy. If the five cents per hour referred to above is paid to employees and taxable to them, but assigned by them to an

insurance company to pay premiums for benefits, the insurance company's claim is entitled to the wage priority. *In re Ross*, 117 F. Supp. 346 (N.D. Cal. 1953). Yet if the same five cents is paid to a welfare fund, which itself buys the insurance, thus affording a permissible tax benefit to employees, the Government contends that the wage priority is not applicable. To deny priority claims on the basis of such a technicality is completely illogical.

The Government attempts to differentiate between compensation to be used for different purposes. This is not the function of a bankruptcy court. *In re Schenectady Railway*, 93 F. Supp. 67, 70 (N. D. N. Y. 1950). The fact that employees use a portion of their compensation to purchase welfare benefits through their welfare fund is not relevant and should not be considered by a bankruptcy court.[8] The welfare fund contributions are part of their earnings for labor performed and "it surely could not have been the purpose of Congress to make the method of computation a criterion of priority." *In re Gurewitz*, 121 Fed. 982, 983 (2d Cir. 1903).

It is important to note that the welfare fund contributions in this case were originally a substitute for sick leave pay formerly enjoyed by employees.[9] The employees, through their collective bargaining agent, gave up paid sick leave in return for this employer contribuiton to the welfare fund and their coverage thereunder (R. 7, 8, 29). We do not believe that the Government would seriously contend that an employee entitled to such sick leave pay due within the three months prior to bankruptcy would not be entitled to priority. Sick leave pay is certainly comparable to severance pay, representing pay for a period of forced absence from work. Cf. *McCloskey v. Division of Enforcement*, 200 F. 2d 402 (9th Cir. 1952). Employees

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[8] See Comment, 44 Virginia Law Review 995 (1958).

[9] The Government's attempt to distinguish the *Otto* and *Ross* cases (Government brief, pp. 27, 28) apparently fails to consider this most important factor.

here gave up sick leave pay for its equivalent, welfare fund contributions. Despite what should be the bankruptcy court's lack of concern with how the wage earner spends his compensation, the Government seeks here to distinguish between collective bargaining equivalents. The Government would not deny that sick leave pay is entitled to priority; yet, it argues that the same compensation in the form of welfare fund contributions is not. The Government's position that contributions to a welfare fund, the purpose of which is to provide sick benefits, are not "wages" within the meaning of the Bankruptcy Act does not withstand logical analysis.

One of the admitted purposes of the wage priority is to provide a protective cushion to employees against the shock occasioned by the loss of employment.[10] This purpose is well served by granting the priority to these contributions. Since eligibility to benefits under a welfare plan may depend upon hours of employment for which contributions are made, an employee's entitlement to benefits may very well depend upon whether these contributions are granted priority and thus paid to the welfare fund. See *U. S. v. Carter*, supra, at p. 214. For example, if an employee's eligibility for welfare benefits is dependent upon the fund's *receipt* of contributions covering a certain number of hours worked by him per month, an employee may lose his eligibility if the fund has not *received* the bankrupt's contributions because of a lack of priority. If priority is granted, the employee will then be assured of protection against the illness of himself or his family at a time when he is least able to protect himself.[11]

The argument that the employee's entitlement to benefits is contingent upon adversity and therefore speculative

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[10] Since the inception of unemployment compensation in all states, the wage priority's original function has been largely preempted. Yet Congress has failed to amend Section 64(a)(2) so as to decrease the breadth of the wage priority.

[11] See 19 Georgia Bar Journal 107.

is, of course, applicable to any situation where insurance principles are involved. This does not lessen the force of the protection given to the wage earner against illness, hospitalization, etc., after bankruptcy, when he is in the worst possible position to afford it. Thus, in line with our modern wage structure, granting a priority to welfare fund contributions fulfills the legislative purpose of protecting the wage earner against but another aspect of the loss of employment, the loss of protection against illness, hospitalization and inability to work.[12]

II. Welfare Fund Contributions Are "Due to" Employees Within the Meaning of Section 64(a) (2) of the Bankruptcy Act.

In the preceding section we have established that welfare fund contributions are "wages" within the meaning of Section 64(a) (2) of the Bankruptcy Act. It remains but to be shown that these contributions are "due to workmen" within the language of that section.

There is nothing unusual in the fact that a claim is made on behalf of a workman by another. The wage priority of Section 64(a) (2) has long survived an assignment by an employee even though the "wages" are then "due to" the assignee regardless of his status and the wage earner's priority benefits the assignee. *In re Stutz*, 226 F. 989 (S. D. N. Y. 1915). The character of the debt is fixed when it is

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[12] Congressional recognition that welfare and pension plans serve this end is illustrated by the Subcommittee Report of the Senate Committee on Labor and Public Welfare, 84th Congress, 2d Session, Senate Report No. 1734, page 2, where it is said:

> "They (welfare and pension programs) constitute an important underpinning of our economic security, broadening and supplementing the various governmental programs. They provide continued income for the sick wage earner, cover hospitalization and surgical costs, maintain purchasing power when the years of active earning are ended, and furnish security to dependents after the worker's death . . ."

incurred. A subsequent assignment, whether to an insurer, to a welfare fund, or anyone else, does not alter the nature of the claim. As this Court said in *Shropshire, Woodliff and Co. v. Bush*, 204 U. S. 186 (1907):

> "The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant."

Moreover, the entire phrase, "due to workmen" may more reasonably be construed as limiting only the types of employees whose wages are entitled to the priority. Had the draftsman intended to give the phrase "due to" any independent meaning to limit the type of wages eligible for the priority, he would have repeated the syntax used in the preceeding limitation ("wages . . . which have been earned") Thus, the clause to have the meaning ascribed by some that wages must be "due to" the employee would read: "wages which have been earned . . . and which are due to workmen . . ." Accordingly, the phrase "due to" is used in Section 64(a)(2) as if it meant "owing." See *Kavanas v. Mead*, 171 F. 2d 195, 198 (4th Cir. 1948); See Note, 66 Yale Law Journal 449, 453.[13]

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[13] We do not believe that it is necessary to consider the question of whether the collective bargaining agreement creates any legally enforceable rights in an employee so as to permit him to sue his employer directly for the unpaid contribution. If he possessed such right, the contributions would certainly be "due to" the employee even within the meaning of the Government's restrictive interpretation. The employee may be the beneficiary of fiduciary obligations owed him by the trustees; he may be the third party beneficiary of the collective bargaining agreement. *2 Restatement of Trusts*, Sec. 282(2); *In re Norwalk Tire and Rubber Co.*, 100 F. Supp. 706 (D.C. Conn. 1951). There is some question as to who can enforce the employer's obligation to make these payments. Cf. *I.L.G.W.U. v. Jay-Ann Co.*, 228 F. 2d 632 (5th Cir. 1956) with Local 333, *United Marine Division v. Essex Transportation Co.*, 216 F. 2d 410 (3rd Cir. 1954). For a discussion of this subject, see 66 Yale Law Journal, 449, 455, 455. Cf. also Section 302 of the Labor Management Relations Act of 1947 and particularly Section 302(e), 29 U.S.C.A. 186.

In any case, we should have thought that this question was settled by this Court's decision in *United States v. Carter*, 353 U. S. 210 (1957). In that case suit was brought by the trustees of a welfare fund established by collective bargaining agreement, and similar to the fund in the instant case, against a surety company on the employer's bond. The Miller Act, 49 Stat. 793, 40 U. S. C. 270a et seq., requires contractors to furnish the United States with a payment bond on any government construction work and grants to persons who provide labor or material on the job the right to sue for "sums justly due him." The lower courts had ruled that the trustees of the welfare fund in that case had neither furnished labor nor were they seeking funds justly due them as required to recover under the statute. This Court reversed and held that welfare fund contributions were compensation justly due them to employees who performed labor on the job and that the trustees of the welfare fund had the right to sue to recover such contribution.

In dicussing the jural realtionship created by the welfare fund, this Court stated:

> "Whether the trustees of the fund are, in a technical sense, assignees of the employee's rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees exclusive rights to enforce payment. *The trustees stand in the shoes of the employees and are entitled to enforce their rights.*
>
> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual as-

signee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash*." (Italics supplied.)

The instant case presents exactly the same situation. The bankrupt's obligation to make the welfare fund contributions arises from the collective bargaining agreement (R. 6, 7, 8, 29, 30). The trust agreement empowers the trustees to collect the amounts due (R. 13, 21). The contributions are, as this Court stated, as much "due to workmen", as are the wages paid directly to them. If the contributions are "justly due" to persons who furnish labor under the Miller Act, they are "due to workmen," as compensation for their services, within the meaning of the Bankruptcy Act.

The Government's attempt to distinguish the *Carter* case does not comprehend the import of this Court's analysis. An employer's collectively bargained obligation to contribute to a welfare fund does not create a debtor-creditor relationship any more than his obligation to pay wages, vacation pay or other forms of compensation. The only difference between vacation pay and the welfare fund contributions involved here is that the contributions are received by the trustees who "stand in the shoes of the employees." The contributions to the welfare fund result directly from the labor of employees just as do their wages, vacation pay, etc. The contributions are, therefore, "due to" employees who have permitted and authorized the welfare fund trustees to "stand in their shoes" in the attempted recovery of such contributions.

III. The Decision of the Court Below Is in Accord with the Realities of Economic Life and Should Be Affirmed.

We believe that logic and reason support the decision of the court below. The court's opinion (R. 42-47) represents a sanguine and intelligent approach, illustrative of the liberal construction courts have always given the claims of wage earners. It is the antithesis of the unduly strict, limited and technical approach the Government has adopted before this Court. As we have previously stated, the precise question presented here was before the Second Circuit in *Local 140 Security Fund v. Hack*, supra, and before several district courts. The *Hack* case and the others present an unduly restrictive and technical interpretation of the Bankruptcy Act. They represent a point of view which does not conform to the realities of our industrial life.

It is interesting to observe that the *Hack* case cites with approval *In re Ross*, 117 F. Supp. 346 (N.D., Cal. 1953). The court states that where employees have assigned a portion of their wages to the welfare fund, "there is a sound basis for a claim of priority by the assignee in such a case," citing *Shropshire Woodliff and Co. v. Bush*, supra. In the *Ross* case, the bankrupt employer had obtained an insurance policy from the claimant insurance company on behalf of his employees deducting from their wages the premiums due. The opinion of the court indicates that no formal assignment of this portion of the wages of the employees was ever made by them to the claimant. In fact, the bankrupt contended that the employees did not have control over this portion of their wages sufficient to make an assignment that would carry with it their wage claim priority. The court rejected this argument commenting that under California law an employee may make an effective assignment of wages earned under an existing employment contract. The court pointed out that if the employer had not agreed to pay the insurance premiums

for the benefit of his employees, they would have had complete freedom of disposition of this portion of their wages which instead went to the insurance company. Since the debt of the bankrupt was incurred for services which the employees rendered and not for insurance benefits, it represented "wages" within the meaning of the Bankruptcy Act.

Thus, the Court of Appeals for the Second Circuit would have declared the payments to the welfare fund to be entitled to priority if employees had assigned this portion of their wages to the fund as was the case in *Ross*, but in the absence of formal assignment by the employees, the contributions were held not entitled to priority. We have already argued that it makes absolutely no sense to treat the same amount in two different ways for purposes of bankruptcy priority, depending upon whether it is paid to employees, taxed to them and then assigned to the welfare fund, or whether it is paid directly by the employer to the welfare fund or insurance company. The Second Circuit's approval of the *Ross* case, however, demonstrates its unnecessary reliance upon the absence of a formal wage assignment in the *Hack* case.

It is possible to distinguish the New York and New Jersey cases on the ground that the courts in those cases believed that wages were not assignable under the laws of those particular states. In *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819 (D. N.J., 1957), the court was careful to point out that the law of New Jersey did not enforce assignments of wages. The law of Pennsylvania, which governs this welfare fund (R. 24), like that of California, permits wage assignments. *Bush v. Eastern Uniform Co.*, 356 Pa. 298 (1947). And to constitute a valid assignment no particular formality is necessary. Any act, conduct or words are sufficient which show an intention to transfer or appropriate a right to the assignee for a consideration. *Moeser v. Schneider*, 158 Pa. 412 (1893); *McCleary v. Stoup*, 32 Pa. Super 42 (1906). It may well be that the real distinction between *Otto* and

the instant case and *Hack* is that in California and Pennsylvania informal wage assignments are permitted and in New York the court, as far as can be determined from its opinion, apparently believed that they were not permitted, being regulated by statute which required the strict observance of certain forms, formalities and filings to be valid.[14]

In pointing out this distinction, however, we do not wish to appear as if we approve it. We do not: We submit, on the contrary, that the broad social policy explicit and implicit in giving a preferential status to "wages" should cover employer contributions to employee welfare funds in New York and New Jersey as well as in California and Pennsylvania, and vagaries of local laws as to wage assignments should not produce different results. Uniformity of treatment is desirable since many welfare plans cover employees in several states and the same employer contributions to each should be treated alike in applying Section 64(a)(2) of the Bankruptcy Act. Cf. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 355 U. S. 448 (1957).[15]

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[14] While it is generally true that wage assignments in New York are strictly regulated by statute, the statute specifically exempts from its coverage deductions from wages for welfare benefits. In its definitions section the statute states:

> "Assignments shall not include . . . such sums as may be deducted by the employer for payment to . . . a trust fund for the benefit of employees, pursuant to agreement in writing . . . with a labor organization of which the employee is a member."

40 McKinney's Consolidated Laws of New York, Sec. 46(1), p. 121, 1957, Cumulative Annual Pocket Part, Laws of New York, Chapter 828, Section 2, effective September 1, 1950. So far as its opinion reveals, the court in *Hack* was unaware of this provision which we believe warrants a different result than that reached by the court. Certainly, this provision of New York law, if known to the court, would have been worthy of comment.

[15] The fear of the court in *Hack* about different methods of contributing to welfare funds resulting in different judicial opinions is without merit. Since such contributions are part of the collectively bargained wage picture, uniformity in the method of computation is unimportant.

The *Otto* case, 146 F. Supp. 786 (S. D. Cal., 1956) is on all fours with the instant case. The Government's attempt to distinguish it on the ground that the welfare fund contributions there came from setting aside a portion of wage increases fails because the contributions in the instant case resulted from the employees' giving up the paid sick leave which they previously enjoyed in return for welfare fund contributions and coverage (R. 6, 7, 8, 29, 30).

The Government's argument in this case fails to comprehend the basic realities of our economic life. The court below recognized that welfare fund contributions are bargained for by unions. They are part of the over-all wage package which results from collective bargaining. Trustees of welfare funds do not negotiate separate contracts with employers after wage negotiations are completed and thus establish a separate debtor-creditor relationship distinct and apart from the wage settlement arrived at through collective bargaining. The employer does not undertake two obligations, one to employees and one to the welfare fund. The welfare fund contributions emanate from the collective bargaining relationship and are an integral part of the wage settlement. They represent the compensation to be paid to employees for the term of the collective bargaining agreement.

The concern of the New York cases and of the Government with a judicial expansion of the definition of "wages" is unfounded. The Court of Appeals for the Third Circuit has not mislabeled such welfare fund contributions. It has merely adapted the term "wages" to modern industrial life and applied a twentieth, rather than a nineteenth century approach in the use of the term in Section 64(a)(2) of the Bankruptcy Act.

The approach of the court below is consistent with the expanded judicial construction of "wages" as used in the Bankruptcy Act. There is no doubt that when Congress first used the term in 1841 it did not have within its contemplation the host of fringe benefits which are today an integral part of the employment relationship. The courts

have consistently held these items to be "wages" and entitled to priority. Yet Congress has refrained from amending the term "wages" in any way for over one hundred years.[16]

This Court's rationale in *United States v. Carter*, supra, lends solid support to the view of the court below. This Court recognized that welfare fund contributions represented compensation to employees. In the negotiation of the collective bargaining agreement with the employer, the union, as the collective bargaining agent of the employees, has agreed that a certain amount of the wage package proposed by the employer be paid to the welfare fund for the benefits employees would obtain thereunder. The employees, acting through their collective bargaining representative, have agreed that a portion of their wage

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[16] Congressional recognition of the status of welfare fund contributions is illustrated by Senate Report No. 1440 of the Senate Committee on Labor and Public Welfare, 85th Congress, 2d Session, dated April 21, 1958, which states in part as follows:

> "Regardless of the form they take, the employers' share of the cost of these plans (employee welfare and pension plans) or the benefits the employers provide are a form of compensation."

And in discussing the characteristics of collectively bargained plans, the Report states:

> "Generally speaking, in collectively bargained plans representatives of labor bargain with management for the benefits to be provided on a cost basis as part of the compensation of the employees."

The Final Report of the Committee on Labor and Public Welfare, 84th Congress, 2nd Session, Senate Report No. 1734, states at page 304:

> "There was general agreement that whether or not the program is jointly or unilaterally administered, whether negotiations are in terms of benefits, cents per hour, or percentage of payroll, the cost of providing the benefits is basically something that belongs to the worker and the worker is entitled to the most benefits for the money involved. The employer has agreed at the bargaining table that contributions to provide certain benefits are due the worker in return for his endeavors."

increases shall be so channeled. Cf. *J. I. Case v. National Labor Relations Board*, 321 U. S. 332 (1944).

This Court, in *Carter*, expressed its awareness of this process when it stated that the "trustees relationship to the employees . . . is closely analogous to that of an assignment." The employees have, through their collective bargaining representative, diverted a portion of their wage increases to the welfare fund. It is unimportant whether this is technically an assignment under the laws of Pennsylvania, New York or California. Agreements between an employer and a union obligating the employer to contribute to a welfare fund are *sui generis*, and the legalistic approach adopted by the Government is not applicable.

The Miller Act, which was before this Court in *Carter*, has the same basic purpose as Section 64(a)(2), the protection of the wage earner against the failure of the employer to pay compensation due for services rendered. Both enactments effectuate a legislative purpose to secure for the employee all sums owed by the employer for the labor he has performed. As the court below stated, there is no reason to treat such contributions one way under the Miller Act and another way under the Bankruptcy Act (R. 47). If they are "justly due" to employees under the Miller Act, they are certainly compensation for services rendered and "wages" within the meaning of Section 64(a)(2) of the Bankruptcy Act.

This Court has pointed the way to a realistic appraisal of the term "wages." No legislative enactment is necessary to characterize what is actual fact in modern industrial relations. The view of the court below is in accord with the realities of our present labor-management structure in which welfare fund contributions are recognized as compensation due to employees. It follows the judicially approved Congressional purpose of protecting the compensation of wage earners. It rejects the technical and legalistic

view in favor of a realistic and common sense approach.

VI. Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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